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In the
# Supreme Court of the United States
October Term, 1988

POLICEMEN'S BENEVOLENT ASSOCIATION OF NEW JERSEY, LOCAL 318, and EDMUND GIORDANO, individually and as president of Local 318,

*Petitioners,*

v.

TOWNSHIP OF WASHINGTON, and JOHN ROBERTSON, Mayor,

*Respondents.*

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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15 pp

# TABLE OF CONTENTS


*Page*

TABLE OF AUTHORITIES ..... ii

SUMMARY OF ARGUMENT ..... 1

ARGUMENT

I. The Third Circuit Correctly Ruled That The Police Department Was A Pervasively Regulated Industry Sufficient To Fall Within The Administrative Search Exception To The Fourth Amendment ..... 2

II. The Administrative Search Exception May Properly Be Applied To Drug Testing ..... 6

III. The Ruling Below Does Not Conflict With The Ruling In *O'Connor V. Ortega* ..... 9

CONCLUSION ..... 12

# TABLE OF AUTHORITIES


*Page*

*Cases:*

*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) ..... 7

*Brotherhood of Maintenance of Way Employees v. Burlington Northern Ry.*, 802 F.2d 1016 (8th Cir. 1986) ..... 5

*Colorado v. Bertine*, 107 S.Ct. 738 (1987) ..... 10

*Donovan v. Dewey*, 452 U.S. 594 (1981) ..... 5, 8

*Illinois v. Lafayette*, 462 U.S. 640 (1983) ..... 10

*New Jersey v. T.L.O.*, 469 U.S. 325 (1985) ..... 10

*New York v. Burger*, 107 S.Ct. 2636 (1987) ..... 3, 4, 6, 8

*O'Connor v. Ortega*, 107 S.Ct. 1492 (1987) ..... 7, 9-11

*Schmerber v. California*, 384 U.S. 757 (1966) ..... 6

*Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 577 ..... 2, 3, 4, 8

*United States v. Jacobsen*, 466 U.S. 109 (1983) ..... 7

*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) ..... 10

*Winston v. Lee*, 470 U.S. 753 (1985) ..... 6

*Other Authorities:*

National Institute on Drug Abuse, Highlights of the 1985 National Household Survey on Drug Abuse (November 1986) ..... 4

## SUMMARY OF ARGUMENT

The Washington Township police force is intensely regulated, such regulation focusing on the conduct of police officers. This pervasive regulation creates a reduced expectation of privacy which justifies application of the administrative search exception, as held by the court below. Random and regular drug testing is needed to serve the important state interest of assuring that the police force be unimpaired by drug usage. The plan developed by Washington Township is comprehensive and provides adequate notice to police officers that testing will occur. The plan further places adequate limits upon the discretion of officials involved in the testing. The intrusion involved in drug testing is minimal, and application of the administrative search exception in this context is justified, and is not contrary to the precedents of this Court.

# ARGUMENT

## I. The Third Circuit Correctly Ruled That The Police Department Was A Pervasively Regulated Industry Sufficient To Fall Within The Administrative Search Exception To The Fourth Amendment.

Petitioners' first contention is that the Third Circuit erred in holding that the police department was a pervasively regulated industry and in applying the requirements necessary to fall within the administrative search exception to the Fourth Amendment. These matters merely constitute the lower court's application of standards developed by this Court to the facts of this particular case. There is no reason or need for this Court to review the Circuit Court's application of such standards to a given set of facts.

In any event, the decision below was clearly correct. In applying the administrative search exception to the drug testing of police officers, the Third Circuit followed its prior ruling in *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 577, where it upheld drug testing of jockeys in light of the highly-regulated nature of horse racing. The court concluded that the police force is more highly regulated, with respect to employee performance, than any industry in the state, and characterized the Washington Township police force as a quasi-military organization (121a).[1]

Petitioners seek to equate the police department with municipal employees in general, contending that police officers are simply subject to the same regulations as apply generally to other public employees. However, the court below relied upon the unique and pervasive regulatory system which in fact governs the police department in question. Police officers are deemed available for duty at all times and are expected to act whenever needed unless disabled or on authorized leave. Washington Township Ordinance 39-1974, Sec. 19-5 (109a-110a). Police officers are subject to extensive regulation concerning their general conduct and appearance while

[1] References are to the Appendix of Petitioners.

on and off duty, including: their manner of dress, grooming, physical fitness; the required carrying of firearms on and off duty; their payment of debts; their use of alcohol, drugs, and smoking; their general standards of conduct and their treatment of others; their involvement in public appearances and commercial testimonials; and their association with persons of ill repute and frequenting of places of ill repute. Washington Township Resolution No. 105-1974, Department Rules and Regulations, chapter 3 (111a-120a). Chapter 4 of the cited rules (120a-121a) contains a particularly relevant provision as follows:

> 4:1.1 (G) He shall submit to and pass such physical examination as may be prescribed by the Chief of Police with the approval of the Township Committee.
>
> (H) He shall submit to and pass such written, oral, psychiatric, physiological, or performance evaluation tests as are prescribed by the Chief of Police with the approval of the Township Committee.

Clearly then, the Washington Township police force is subject to far more extensive regulation than are municipal employees in general. The court below correctly found the police officers to be subject to such pervasive regulation as to create a reduced expectation of privacy. Petitioners are simply incorrect in claiming that the ruling below creates an exception so broad that it swallows all Fourth Amendment protection accorded public employees. The ruling below is limited to the police force and is based upon the unique and pervasive regulation of police officers as employees.

The administrative search exception may be applied: (1) where there is a substantial governmental interest at stake; (2) where the searches are necessary to serve the regulatory scheme; and (3) where the program, in terms of certainty and regularity of application, provides a constitutionally adequate substitute for a warrant. *New York v. Burger*, 107 S.Ct. 2636, 2644 (1987). These standards are met in the present case. Petitioners incorrectly claim that the court below ignored these factors in the present case. The court found its prior ruling in *Shoemaker* to be controlling. *Shoemaker* analyzed the third factor at some length in upholding the drug testing of jockeys. 795 F.2d at 1142-1143. The court below found

that the plan herein contained essentially the same protections as it had upheld in *Shoemaker* (100a). The court below also discussed the important state interest at stake (101a).

The state interest in preventing drug usage among the police force is more than substantial, it is compelling. The effectiveness of the police department will depend in large part on the degree of confidence and respect reposed by the public in the members of the force. Moreover, police officers are frequently involved in dangerous activity and are called upon to resolve life-threatening crises. They are authorized to use force, including deadly force, where appropriate, and to engage in high-speed chases. They are required to carry firearms both on and off duty. Few state interests could be more compelling than to assure the effectiveness and fitness of the police force, and to assure that the judgment and reflexes of police officers be unimpaired by drug usage.

Petitioners assert that no evidence of actual drug problems among the Washington Township police force was presented. Such a showing is unnecessary. In *New York v. Burger*, 107 S.Ct. at 2646-2647, this Court relied upon the general societal problem of automobile theft to demonstrate a substantial interest in regulating automobile junkyards. Drug usage is a pervasive problem nationwide. A recent NIDA study shows that among employed 20-40 year olds nationwide, 29% reported use of illegal drugs in the past year, and 19% reported some illegal drug use at least once in the last month. Among young adults age 18-25, the numbers are even higher, 42% reported using illegal drugs in the past year. Overall, 70.4 million Americans age 12 and over (37% of the population) have used marijuana, cocaine or other illegal drugs during their lifetime. *National Institute on Drug Abuse, Highlights of the 1985 National Household Survey on Drug Abuse.* (November 1986).

Because drug usage is engaged in privately and secretly, documentation of the extent of the problem among a particular police force is impossible without testing. Certainly, the extent of the problem nationwide justified Washington Township in taking steps to detect, prevent, and deter the problem. Particularly in the context of law enforcement, where the potential for tragedy is obvious and substantial, the Township need not await a disaster, so that it can demonstrate an actual drug problem, before taking steps to prevent the problem.

Petitioners also contend that there is no need for random testing and regular testing, and that the less intrusive measure of observing officers for signs of impairment before testing is adequate. First, close observation is impractical. Police officers frequently work alone and unsupervised — continuous supervision is unrealistic, and would greatly interfere with effective police work. Moreover, police officers are expected to respond when needed during their off duty hours, at which times there is no supervision at all.

More important, drug usage is not easily detected, and the outward signs of impairment, particularly in the early stages of usage, are often nonexistent, or at best, subtle. As the Eighth Circuit has observed: "[i]t is the insidious nature of these substances that too often the user's faculties are impaired and the damage done through a serious error on his part **before** he realizes he is impaired and without any outward sign that could lead a supervisor or other person to intervene." *Brotherhood of Maintenance of Way Employees v. Burlington Northern Ry.*, 802 F.2d 1016, 1020 (8th Cir. 1986) (emphasis supplied). In the case of police officers, the first outward manifestation of impairment could well consist of an error resulting in injury or death to a citizen, to a fellow officer, or to the officer himself.

Observation is clearly inadequate, and testing at random and on a regular basis is necessary to effectuate the compelling interest of assuring an unimpaired police force. Random and regular testing is not intended simply to identify those officers with a serious drug problem. An important and perhaps primary goal is preventative. A police officer with no existing drug problem will think twice before engaging in what may start as experimental or recreational drug usage, if faced with the prospect of random testing. Such deterrence is not provided with the mere observation of an officer's on-duty performance. Certainly, the Township has a strong interest in deterring and preventing drug problems before they develop.

Petitioners finally contend that the random nature of the testing demonstrates that it is not subject to sufficient standards to substitute for a warrant. This Court has held that a scheme is adequate so long as it is sufficiently comprehensive and defined that the person in question cannot help but be aware that he will be subjected to periodic searches for specific purposes. *Donovan v. Dewey*, 452 U.S. 594, 600 (1981), and so long as it contains

adequate standards to limit the discretion of persons responsible for the searches. *New York v. Burger,* 107 S.Ct. at 2644. The plan herein satisfies both standards.

First, the plan was announced well in advance of implementation, giving every officer notice that testing would occur. The plan is comprehensive, and details have been promulgated in writing, and are available to all employees. An annual medical exam to be given each employee is to be scheduled, and is to include a urinalysis test (11a). Subjects of random testing are to be selected by computer, with computer programming to be done by an independent contractor (12a). The testing itself is to be done by medical personnel from a testing laboratory hired by the Township, subject to detailed specifications. Clearly, discretion in Township officials is narrowly circumscribed, and the plan provides a constitutionally adequate substitute for a warrant. All of the requirements for the administrative search exception are met in this case.

## II. The Administrative Search Exception May Properly Be Applied To Drug Testing.

Petitioners contend that application of the administrative search exception to drug testing is unwarranted because the exception has previously been utilized by this Court only in the context of searches of premises. However, even as to medical procedures which intrude below the skin, the applicable test under the Fourth Amendment is whether the privacy interest of the individual is outweighed by the societal interest in conducting the procedure. *Winston v. Lee,* 470 U.S. 753, 760 (1985). This Court has held that blood testing does not represent an unduly extensive imposition upon an individual's personal privacy and bodily integrity, in light of the commonplace nature of blood tests and the fact that such a test presents virtually no risk, trauma or pain. *Winston,* 470 U.S. at 761-762; *Schmerber v. California,* 384 U.S. 757, 771 (1966).

Likewise, urine testing is commonplace and routine for anyone who has regular medical examinations, including persons required to have medical exams in connection with their employment. Employment-related medical exams are quite common, particularly in a field such as police work, where physical fitness is a job

prerequisite. The procedure does not intrude below the skin, and is even safer and less traumatic than a blood test. The Washington Township plan permits the urination to occur unobserved, unless there is cause to suspect tampering (13a). The procedure is simply not an extraordinary invasion of one's privacy and security.

Drug testing by employers is becoming increasingly common throughout the country. Private employers are not subject to Fourth Amendment strictures, and employees in the private sector have therefore become increasingly accustomed to the use of drug tests. In *O'Connor v. Ortega,* 107 S.Ct. 1492, 1499 (1987) (plurality opinion), this Court observed that the privacy expectations of public employees, "like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." In his concurring opinion, Justice Scalia concluded that searches by a public employer do not violate the Fourth Amendment when they are "of the sort that are regarded as reasonable and normal in the private-employer context". 107 S.Ct. at 1506 (Scalia, J., concurring).

To permit drug testing of public employees is merely to place them on the same footing as private employees, and can hardly be deemed an unusual or unreasonable intrusion. In *Abood v. Detroit Board of Education,* 431 U.S. 209, 229 (1977), this Court held that the First Amendment rights of public employees are no weightier than that of private employees, and concluded that "[p]ublic employees are not basically different from private employees." Likewise, in the context of drug-testing, public employees should not be held to have a greater expectation of privacy than do private employees.

Clearly, police officers have no legitimate expectation of privacy in the result of the testing, i.e., in whether they use illegal drugs. According to this Court in *United States v. Jacobsen,* 466 U.S. 109, 122-123 (1983):

> The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities...
>
> A chemical test that merely discloses whether or not

> a particular substance is cocaine does not compromise any legitimate interest in privacy.
>
> [footnote omitted].

Petitioners complain that urinalysis can reveal other private facts. However, under the Plan, testing is to be done and results are to be reported only for specific illegal drugs designated by the Township (14a).

The administrative search exception is based upon the lowered expectation of privacy held by persons who voluntarily enter a heavily regulated business. *Donovan v. Dewey*, 452 U.S. 594, 598-599 (1981); *New York v. Burger*, 107 S.C5. 2636, 2642-2643 (1987). The prior cases of this Court have involved the search of business premises because the regulatory schemes in question have focused upon the conducting of the business. In *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 577, where the court applied the exception to breath and urine testing of jockeys, the court observed:

> Consequently, while there are distinctions between searches of premises and searches of persons, in the intensely-regulated field of horse racing, where **the persons engaged in the regulated activity are the principal regulatory concern**, the distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable. We therefore hold that the administrative search exception applies to warrantless breath and urine testing of employees in the heavily regulated horse-racing industry.
>
> [emphasis added].

Similarly, in this case, the police officers themselves are the focus of the regulatory scheme. Upon entering the police department, all officers know that they will be subjected to extensive regulation, including regulation of matters of a highly personal nature, unlike any standards which apply to employees in general. Most significantly, they know that they will be expected to submit to physical exams and psychiatric and physiological testing as directed.

In short, the regulatory scheme is focused on the person and creates a lowered expectation of privacy as to one's person, as opposed to one's property or premises. Upon voluntarily entering the police force, an officer thereby consents to become subject to extensive regulation of his conduct and of his person. Under such circumstances, a urine test does not pose a substantial distinction from the premises searches which have been upheld by this Court in applying the administrative search exception.

## III. The Ruling Below Does Not Conflict With The Ruling In *O'Connor V. Ortega*

The ruling below is in no way inconsistent with this Court's ruling in *O'Connor v. Ortega,* 107 S.Ct. 1492 (1987) (plurality opinion). First, that case did not involve drug testing, and the plurality opinion specifically noted that the Court was not addressing the proper standard to be applied in the drug testing context. 107 S.Ct. at 1504. Rather, *O'Connor* involved the search of the office of a state hospital employee. This Court ruled that public employees do not lose their Fourth Amendment rights in the workplace; however, the court below never suggested the contrary in the present case. The court below simply concluded that in the specific context of drug testing of police officers, there was a sufficiently reduced expectation of privacy to justify random and regularly scheduled testing.

In fact, the plurality opinion in *O'Connor,* as well as the concurring opinion of Justice Scalia, concluded that warrantless searches of employee offices are proper, subject to a test of reasonableness, for employment-related searches. The plurality held that for some employee offices, there would be no legitimate expectation of privacy at all. 107 S.Ct. at 1498. When such expectation did exist, neither a warrant nor probable cause would be required for a work-related search (defined to include both non-investigatory and investigatory work-related employee misconduct searches). 107 S.Ct. at 1500–1502. Rather, the propriety of such searches was to be judged solely on the basis of reasonableness under the circumstances, and the Court left undetermined whether such standard even included a need for "individualized suspicion" before a search

was justified. 107 S.Ct. at 1502-1503. The concurring opinion of Justice Scalia differs from the plurality by concluding that all employee offices should be subject to the test of reasonableness, instead of being subjected initially to a case-by-case determination of whether there is legitimate expectation of privacy in the first instance. 107 S.Ct. at 1505-1506.

Thus, even for ordinary governmental employees, this Court has not foreclosed the possibility of random or regularly scheduled searches. Similarly, in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), where the Court upheld warrantless searches, without requiring probable cause, in the context of searching the purse of a high school student, the Court adopted a test of reasonableness and declined to determine whether a showing of individualized suspicion was required, suggesting that some circumstances "might justify school authorities in conducting searches unsupported by individualized suspicion." 469 U.S. at 342, n. 8. In *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976), the Court upheld routine stops at checkpoints near the border, reasoning that a quantum of individualized suspicion is not an "irreducible requirement" of the Fourth Amendment.

In the context of standardized inventory searches, done for administrative reasons rather than for criminal investigation, this Court has consistently judged such searches under a standard of reasonableness, without requiring any showing of individualized suspicion. *Colorado v. Bertine*, 107 S.Ct. 738, 741 (1987); *Illinois v. Lafayette*, 462 U.S. 640 (1983). The Court has not even required in such context that the least intrusive means be used, concluding that reasonableness does not necessarily turn on the existence of less intrusive alternatives. 462 U.S. at 647. Clearly then, this Court has never held that searches without a showing of reasonable suspicion are violative of the Fourth Amendment in all cases except the narrowly construed administrative search cases the Court has already recognized. Rather, the prior rulings of this Court hold that, outside the context of criminal investigation,[2] reasonableness is the relevant test, and the Court has not ruled that individualized suspicion is a necessary component of reasonableness.

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[2] Petitioners contend that the plan does not prevent use of the test results for criminal prosecutions. In fact, the plan specifically provides that testing is not to be done to collect evidence for use in criminal proceedings (15a).

In fact, the plurality opinion in *O'Connor* describes the invasion of privacy involved in the search of an employee's office as being relatively limited, comparable to that involved in an administrative search case. 107 S.Ct. at 1502. In the present case, the court below found a lowered expectation of privacy in the context of drug testing of police officers, based upon the pervasive regulatory scheme applicable to their employment. There is nothing in the *O'Connor* ruling which forecloses or even questions such a result. The ruling below in no way conflicts with the previous rulings of this Court, and review is therefore unnecessary.

## CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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